Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1356

In the Supreme Court of the United States

October Term, 1984

THE KOHN BEVERAGE COMPANY,
Petitioner,

vs.

TEAMSTER'S LOCAL 348 HEALTH AND WELFARE FUND, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BERNARD S. GOLDFARB
(*Counsel of Record*)
MARK V. WEBBER
GOLDFARB & REZNICK
Eighteen Hundred
55 Public Square
Cleveland, Ohio 44113
(216) 781-0383
Attorneys for Respondent Central States, Southeast and Southwest Areas Pension Fund

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO TEL. (216) 621-5647

BEST AVAILABLE COPY

32 pp

QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals correctly determined that a collective bargaining agreement which required contributions to the Central States Southeast and Southwest Areas Pension Fund on behalf of both union and non-union personnel when the agreement contained a recognition clause making the union the collective bargaining agent for all employees regardless of union membership, when the agreement defined employees by job function, and when a "union shop" clause did not modify the definition of "employee."

2. The Court of Appeals correctly refused to apply estoppel principles against the trustees of a multi-employer pension plan to excuse contributions to the plan where an independent union official, over whom the pension fund trustees had no control, made unauthorized statements pertaining to pension coverage to employees of a contributing employer, and where the employer did not reasonably rely upon those statements, having available the plan documents which defined the terms of contributions and which expressly limited the fund's agents to those authorized in writing by the trustees to act in their behalf.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
STATUTORY PROVISIONS INVOLVED 2
COUNTERSTATEMENT OF THE CASE 8
Factual Background 10
REASONS WHY THE WRIT SHOULD BE DENIED 16
Summary 16
Argument 17
I. The Court of Appeals Correctly Determined That the Collective Bargaining Agreement Herein Required Contributions to the Pension Fund for Both Union and Non-Union Personnel Within the Same Job Classifications 17
II. This Court Should Not Address the Estoppel Issue Where Petitioner Failed to Prove the Essential Element of Reasonable Reliance, Where Abundant Precedent Disfavors Use of Estoppel Principles Against the Trustees of Multiemployer Plans, and Where There Is No Conflict in the Circuits on the Use of Estoppel Principles on the Facts of This Case 20
CONCLUSION 24
APPENDIX:
Exhibit "A" A1

TABLE OF AUTHORITIES

Cases

Aitken v. IP&GCU-Employer Retirement Fund, 604 F.2d 1261 (9th Cir. 1979) 22

Audit Services, Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981) 19

Blinkhorn v. McCarthy, 332 A.2d 43 (1974) 22

Carpenters and Millwrights Health Benefit Trust v. Gardineer Dry Walling Co., 573 F.2d 1172 (10th Cir. 1978) 19

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 698 F.2d 802 (6th Cir. 1983), *cert. granted*, ... U.S. ....., 104 S. Ct. 3531 (1984) 19

Chamberlain v. Bakery Confectionary Union & Industry International Pension Fund, No. C-76-784-CBR (N.D. Cal. October 3, 1977) 21

Dohrer v. Wakeman, 14 Wash. App. 157, 539 P.2d 91 (1975) 21, 23

Dura Corp. v. NLRB, 380 F.2d 970 (6th Cir. 1967) 19

Galvez v. Local 804 Welfare Trust Fund, 543 F. Supp. 316 (E.D. N.Y. 1982) 21-22

Hiebel v. Pension Fund, Central States, Southeast and Southwest Areas, 96 CCH Lab. Cas. ¶14,137 (W.D. Mich. 1982) 23

Hodgins v. Central States, Southeast & Southwest Areas Pension Fund, 94 L.R.R.M. 2507 (E.D. Mich. 1976) 21

Hodgins v. Central States Southeast and Southwest Areas Pension Fund, 624 F.2d 760 (6th Cir. 1980) 20-21

Jandel Furs, 100 N.L.R.B. 1390, 30 L.R.R.M. 1463 (NLRB 1952) 20

Kroger Co. v. NLRB, 401 F.2d 682 (6th Cir. 1968) 19

Manning v. Wiscombe, 498 F.2d 1311 (10th Cir. 1974) 19

Markt v. Ro-Mart, Inc., 471 F. Supp. 1292 (N.D. Cal. 1979) 19

Mathew v. Burns, Inc., 205 Misc. 1006, 129 N.Y.S. 841 (1954) 19-20

Melang v. I.B.E.W. Pacific Coast Pension Fund, 93 L.R.R.M. 2389 (W.D. Wash. 1976) 21

Miracle v. U M W Welfare Fund, 373 F. Supp. 603 (D.D.C. 1974) 23

Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969) 21

NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975) 19

Pennello v. Mine Workers, 88 F. Supp. 935 (D.D.C. 1950) 20

Phillips v. Kennedy, 542 F.2d 52 (8th Cir. 1976) 21, 22, 23

Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978) 17, 21, 22, 24

Rosen v. Hotel and Restaurant Employees & Bartenders Union, 637 F.2d 592 (3d Cir. 1981) 17, 23

Scheuer v. Central States Pension Fund, 358 F. Supp. 1332 (E.D. Wis. 1973) 21, 22, 23, 24

Scheuer v. Central States Pension Fund, 394 F. Supp. 193 (E.D. Wis. 1975), *aff'd*, 570 F.2d 347 (7th Cir. 1977) 17

Shaw v. Northwest Truck Repair, Inc., 91 L.R.R.M. 2051 (Ore. Sup. Ct. 1975) 23

Teamster's Local 348 Health and Welfare Fund, et al. v. The Kohn Beverage Company, 749 F.2d 315 (6th Cir. 1984) 1, 9

Teamster's Local 348 Health and Welfare Fund, et al. v. The Kohn Beverage Company, Case No. C82-2938A (N.D. Ohio Aug. 25, 1983) 1-2

Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 (9th Cir. 1976) 21, 22

Trust Fund Services v. Glasscar, Inc., 19 Wash. App. 736, 98 L.R.R.M. 2656 (Wash. Ct. App. 1978) 20

Yglesias v. United Paperworkers Pension Fund, 2 EBC 1851 (E.D. N.Y. 1981) 23

Statutes

Employee Retirement Income Security Act of 1974 (ERISA)

Section 3(1), 29 U.S.C. §1002(1) 10
Section 3(2), 29 U.S.C. §1002(2) 10
Section 3(3), 29 U.S.C. §1002(3) 10
Section 3(5), 29 U.S.C. §1002(5) 11
Section 3(11), 29 U.S.C. §1002(11) 11
Section 3(12), 29 U.S.C. §1002(12) 11
Section 3(14), 29 U.S.C. §1002(14) 11
Section 3(37), 29 U.S.C. §1002(37) 10
Section 404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D) 23
Section 502, 29 U.S.C. §1132 10
Section 502(a), 29 U.S.C. §1132(a) 2
Section 502(d), 29 U.S.C. §1132(d) 2, 3

Section 502(e), 29 U.S.C. §1132(e) 2, 3
Section 502(f), 29 U.S.C. §1132(f) 2, 3
Section 502(g)(2), 29 U.S.C. §1132(g)(2) 2, 3

Judicial Code and Judiciary

28 U.S.C. §1332(a) 6, 10

Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §151 *et eq.*

Section 8(a), 29 U.S.C. §158(a) 6, 16, 19
Section 301(a), 29 U.S.C. §185(a) 5, 10

Multiemployer Pension Plan Amendments Act of 1980

Section 306, ERISA §515, 29 U.S.C. §1145 .....5, 10, 11

No. 84-1356

In the Supreme Court of the United States

October Term, 1984

THE KOHN BEVERAGE COMPANY,
Petitioner,

vs.

TEAMSTER'S LOCAL 348 HEALTH AND WELFARE FUND, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Central States Southeast and Southwest Areas Pension Fund through counsel respectfully prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

This case arose from the decision of the Sixth Circuit Court of Appeals in *Teamster's Local 348 Health and Welfare Fund, et al. v. Kohn Beverage Company*, 749 F.2d 315 (1984), which reversed the unpublished opinion of August 25, 1983, in *Teamster's Local 348 Health and Wel-*

fare Fund, et al. v. The Kohn Beverage Company, Case No. C82-2938A (N.D. Ohio Aug. 25, 1983).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974 §502(a), (d), (e), (f), (g)(2), 29 U.S.C. §1132(a), (d), (e), (f), (g)(2)

Civil Enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Status of employee benefit plan as entity

(d) (1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Jurisdiction

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this

subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Attorney's fees and costs

(g) (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 1145 of this Title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted

under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Multiemployer Pension Plan Amendments Act of 1980 §306, ERISA §515, 29 U.S.C. §1145

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsisent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Labor-Management Relations Act §301(a), 29 U.S.C. §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Judicial Code and Judiciary, 28 U.S.C. §1332(a)

Diversity of Citizenship; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Labor-Management Relations Act §8(a), 29 U.S.C. §158(a)

Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

COUNTERSTATEMENT OF THE CASE

On January 4, 1983, plaintiff Central States Southeast and Southwest Areas Pension Fund, 8550 West Bryn Mawr Avenue, Chicago, Illinois (hereinafter "Pension Fund"), first discovered that it had been named a co-plaintiff with Teamster's Local 348 Health and Welfare Fund in a pending delinquent contribution case against Kohn Beverage Company. The Pension Fund had not authorized any such litigation and immediately retained its present counsel to represent it. *See* Affidavit of George Psaras filed January 10, 1983, in motion to dismiss (Docket Item 31) (Appendix, page 48). The Pension Fund filed its own amended complaint on March 4, 1983, and participated in the trial of March 10-11, 1983.

On August 28, 1983, the district court entered its findings of fact and conclusions of law, memorandum of opinion and judgment entry, in which it held in favor of defendant as against both plaintiffs. As to the Pension Fund, the court held that contributions to the Pension Fund were not owing upon replacement, non-union personnel working under a collective bargaining agreement with union personnnel, despite its finding that the wages, conditions, and hours of employment were identical for non-union and union personnel, and despite the finding that the replacements performed the same job func-

tions as their union predecessors. The non-union personnel had replaced union personnel discharged as a result of an unauthorized work stoppage. The court further held that the Pension Fund had clothed a union representative with apparent authority to act on its behalf despite a total absence of any such evidence in the record and, further, that the Pension Fund was estopped to claim contributions because of alleged unauthorized statements by the union representative, over whom it had no control, that non-union, replacement employees would not receive coverage under the Pension Fund plan.

On September 22, 1983, the Pension Fund filed a timely notice of appeal to the Sixth Circuit Court of Appeals (hereinafter "Court of Appeals"), which reversed the trial court after determining that the trial court's findings as to the coverage of the collective bargaining agreement and as to the employment of estoppel principles against the Pension Fund were clearly erroneous. *Teamster's Local 348 Health and Welfare Fund, et al. v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984). The Court of Appeals held that the collective bargaining agreement required contributions to the Pension Fund for both union and nonunion personnel working under its terms and that estoppel principles were unavailable against the Pension Fund to an employer which did not reasonably rely upon the unauthorized statements of a union official who had no authority to speak for the Pension Fund in the face of written plan documents limiting agency to those authorized by the Pension Fund Trustees to act in their behalf.

Factual Background

Jurisdiction of the trial court was founded upon §301(a) of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §185(a)), §502 of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA") (29 U.S.C. §1132), and §306 of the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. §1145), and 28 U.S.C. §1332 (Diversity of Citizenship).

Respondent Pension Fund is a multiemployer employee benefit plan within the meaning of §3(1), (2), (3), and (37), §502 and §515 of ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. §1002(1), (2), (3), and (37), §1132 and 29 U.S.C. §1145), and brought this action on behalf of the Trustees, participants, and beneficiaries of said Plan.

The Pension Fund maintains offices and its principal place of business in a state other than the State of Ohio, to-wit: 8550 West Bryn Mawr Avenue, in the City of Chicago, County of Cook, State of Illinois, and is a citizen of the State of Illinois (Stipulation Fact 4; Appendix, page 58). Petitioner, The Kohn Beverage Company (hereinafter "Kohn"), is a corporation organized and existing under the laws of the State of Ohio. Petitioner Kohn maintained offices and a place of business within the State of Ohio, in the City of Akron, State of Ohio, and is a citizen of the State of Ohio. Petitioner was engaged in the business of the transportation of goods in interstate commerce (Stipulation Fact 1, 2; Appendix, page 58).

Petitioner is an employer and a party in interest in an industry affecting commerce within the meaning of

§3(5), (11), (12), and (14) of ERISA (29 U.S.C. §1002(5), (11), (12), and (14)), §306 of the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. §1145), and the Labor Management Relations Act of 1947, as amended (29 U.S.C. §151 *et seq.*).

On or about June 1, 1977, petitioner Kohn executed with Teamster's Local 348 a participation agreement in the Pension Fund. Kohn was a participating employer in the Fund. On February 20, 1981, Kohn and Teamster's Local 348 executed a collective bargaining agreement for the period June 1, 1980, until May 31, 1983, providing in pertinent part as follows (Stipulation Fact 3; Appendix, page 58):

> ARTICLE I: UNION RECOGNITION
>
> The Employer recognizes the Union as the sole and exclusive bargaining agent on behalf of all employees of the Employers, as hereinafter defined in Article II, with respect to wages, hours, and all other terms or conditions of employment.
>
> ARTICLE II: EMPLOYEES DEFINED-EXTENT OF BARGAINING UNIT
>
> The term "Employees", as used in this Agreement, shall include Driver-Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees.
>
> ARTICLE VI: UNION SHOP CLAUSE
>
> It shall be a condition of employment that all employees of the Employers covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement, shall remain

members in good standing by the payment of membership dues and those who are not members on the effective date of this Agreement shall, on the thirty-first (31) day following the effective date of this Agreement, become and remain members in good standing in the Union by payment of membership dues. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the thirty-first (31) day following the beginning of such employment, become and remain members in good standing in the Union by payment of membership dues.

ARTICLE XVII: PENSION

Effective June 1, 1980, the Employer shall contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of Forty-six Dollars ($46.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1981, the Employer shall increase said contribution to Fifty-one Dollars ($51.00) per week for each regular employee covered by this Agreement.

Effective June 1, 1982, the Employer shall continue to pay the sum of Fifty-one Dollars ($51.00) per week as contribution to said fund for each regular employee covered by this Agreement plus any increase in contributions as same are negotiated in the National Master Freight Agreement.

(Appendix, pages 66, 67, 73).

Section 1.06(a) of the Central States Southeast and Southwest Areas Pension Fund Plan, in effect July 1, 1980, to date, defines "employee" as follows:

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as hereinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer. . . .

Section 1.04 defines "employer" as follows:

Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the future be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements for participation established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto.

Section 1.05 defines "union" as follows:

Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local unions, and such other unions as the Trustees may agree upon.

(Appendix, page 328).

Article I, Section 1 of the Revised and Amended Trust Agreements of the Pension Fund have similar definitions of "employee," "employer," and "union." *See* CS Exhibits 3, 4 and 6 (Appendix, pages 217, 238, 259).

Section 1.09 of the Plan defines "collective bargaining agreement" as follows:

> Section 1.09: Collective Bargaining Agreement, as used herein, shall mean an agreement to which any Union, as defined herein, is a party with an Employer, as defined herein.

(CS Exhibit 7; Appendix, page 329).

On September 1, 1981, approximately twenty-nine employees of Kohn allegedly engaged in an unauthorized work stoppage. Subsequently, all but two (2) employees were terminated from their job by the employer as a result of their alleged participation in said unauthorized work stoppage. All twenty-nine discharged employees were employees under the following classifications, as described in Article II of the collective bargaining agreement between the parties (CS Exhibit 2): driver-salesmen, helpers, warehousemen, garage mechanics, over-the-road drivers (Stipulation Fact 15-18; Appendix, page 60).

After September 3, 1981, Kohn hired replacements for the discharged employees, which replacements worked as driver-salesmen, helpers and warehousemen, as described in Article II of the collective bargaining agreement. As of February 24, 1983, Kohn had twenty-four employees, twenty-two of whom were replacements for the discharged employees and two of whom were not discharged because they did not participate in the "wildcat strike" of September 1981. The twenty-two replacements did not become members of Local 348. The two other employees

were members of Local 348 prior to September 1, 1981, and continued to be members of Local Union 348 (Stipulation Fact 19, 18, 20; Appendix, page 61).

Kohn recognized an obligation to pay contributions to the Pension Fund for the two union employees from September 1, 1981, pursuant to Article XVII of the collective bargaining agreement (Stipulation Fact 21).

All of the "non-discharged" employees had been on the Kohn payroll at least 32 days (Record, page 5; Appendix, page 445). Kohn did not notify the Pension Fund that it had hired replacements for the discharged employees by filling out "Employee, Billing Changes and Corrections Forms." Kohn recognized that it was the employer's obligation to notify the Pension Fund of the names and employment histories of additional employees working under the collective bargaining agreement. *See* Record, pages 280-281. Kohn did not make any contributions to the Pension Fund on behalf of any of the non-union replacements hired after September 1, 1981, to replace the discharged employees (Transcript, page 26; Stipulation Fact 22; Appendix, pages 449 and 61).

Except for non-payment of union dues and non-payment of health and welfare and pension contributions to Teamster's Local 348 Health and Welfare Plan and the Pension Fund, Kohn has treated the wages, conditions, and hours of employment of the non-union replacements identically to those of the discharged employees and the two remaining union employees of Kohn (Transcript, page 25; Appendix, page 445). These wages, conditions, and hours of employment are described in the collective bargaining agreement (Appendix, pages 176-208). Discharged employees Douglas, Brannon, and Byrd were reinstated

pursuant to arbitration decisions, but the company did not pay the Pension Fund the contributions owed on their behalf (Appendix, pages 450-451, 395, 409, 423).

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY

Supreme Court review of this case is unwarranted. The Court of Appeals merely upheld the well settled principle of labor contract construction that collective bargaining agreements which define covered employees by job function cover both union and non-union personnel despite the provision of a union shop clause, which does not modify the definition of the word "employee," and which therefore does not require an employee to join the union. Furthermore, conditioning payment of contributions or benefits solely on the basis of union membership violates Section 8(a) of the LMRA.

Additionally, although the vast majority of courts have rejected the application of estoppel principles against the trustees of multiemployer pension plans, this Court need not even reach the estoppel issue because the Court of Appeals correctly determined that the employer had not reasonably relied upon purported unauthorized statements as to pension coverage of a union official over whom the Pension Fund had no control. This was particularly true in view of the existence of plan documents which defined coverage and which limited agency status to those persons authorized in writing by the Pension Fund Trustees to act on their behalf.

Furthermore, petitioner has demonstrated no conflict between circuits on the estoppel issue insofar as the two cases relied principally upon by petitioner are inapposite

to the Pension Fund case. *Rosen v. Hotel and Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3d Cir. 1981), pertained to the "extraordinary circumstance" of detrimental reliance upon the statements of a *trustee* of a fund, a situation not present against the Pension Fund. *Scheuer v. Central States Pension Fund*, 394 F. Supp. 193 (E.D. Wis. 1975), *aff'd*, 570 F.2d 347 (7th Cir. 1977), has been implicitly sapped of its authority by a subsequent decision in the same circuit disavowing the *Scheuer* principles. *See Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978).

ARGUMENT

I. The Court of Appeals Correctly Determined That the Collective Bargaining Agreement Herein Required Contributions to the Pension Fund for Both Union and Non-Union Personnel Within the Same Job Classifications.

Article II of the collective bargaining agreement defines "employees" as "Driver Salesmen, Special Drivers, Swing Drivers, Over-the-Road Drivers, Helpers and Warehousemen, Garage Mechanics and Garage Maintenance employees." Union membership was not a part of the definition. All that was required was that one perform certain functions under the collective bargaining agreement. Without question, the non-union "replacement" employees hired after the "wildcat" strike in September 1981 performed the exact functions under the collective bargaining agreement as their predecessors, as driver-salesmen, helpers, and warehousemen. The evidence on this issue was uncontradicted.

The parties stipulated that "after September 3, 1981, Kohn hired replacements for the discharged employees, which replacements worked as driver salesmen, helpers, and warehousemen as described in Article II of the collective bargaining agreement." Still further, Mrs. Diehl, Vice-President of petitioner, testified at page 25 of the transcript that except for non-payment of pension and health and welfare benefits to the Pension Fund and Local 348 Health and Welfare Plan, and union dues, petitioner treated the wages, conditions, and hours of employment of the replacements identically to those of their union predecessors[1] (Appendix, page 24). Clearly, therefore, the job classifications of the replacement driver-salesmen, helpers, and warehousemen demonstrate that the non-union replacements were covered employees under the collective bargaining agreement. The non-union employees were in the same bargaining unit as the union employees.

The Central States Plan does not require union membership for an employee to qualify for benefits. It defines "employee" as a non-supervisory person who has been on the payroll for at least thirty days under the terms of the collective bargaining agreement between a union and an employer. *See* Plan Section 1.06(a) (Appendix, page 325). *See also* Trust Agreement Article I, Section 1 (CS Exhibit 6; Appendix, page 259).

The Sixth Circuit Court of Appeals correctly reaffirmed its prior position that job classification and not union

---

1. The trial court correctly found as much as Finding of Fact No. 23, which provides as follows:

> Between September 3, 1981, and October 1, 1981, the defendant, Kohn Beverage Company, hired a number of employees to replace the terminated employees. These new employees were hired as drivers, salesmen, warehousemen, and helpers, and in terms of wages, conditions and hours of employment, were treated identically to their predecessors.

membership controls coverage of the collective bargaining agreement. *See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983), *cert. granted*, ... U.S. ....., 104 S. Ct. 3531 (1984). In this case the Court of Appeals held in accordance with an abundance of precedent that the recognition clause of the collective bargaining agreements makes the union the collective bargaining representative for all employees, both union and non-union. The union shop clause does not require union membership and indicates that employees may exist under the agreement apart from union-member employees.

To hold otherwise would render the union shop clause meaningless as requiring union members to become union members! Abundant precedent supported the position of the Court of Appeals. *See Audit Services, Inc. v. Rolfson*, 641 F.2d 757 (9th Cir. 1981); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974); *Carpenters and Millwrights Health Benefit Trust v. Gardineer Dry Walling Co.*, 573 F. 2d 1172 (10th Cir. 1978); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975); *Markt v. Ro-Mart, Inc.*, 471 F. Supp. 1292 (N.D. Cal. 1979).

In the face of this avalanche of precedent, petitioner has not presented a single case, other than the overturned district court decision herein, which supports its restrictive view of the coverage of a collective bargaining agreement. Furthermore, to adopt that view is to violate Section 8(a) of the LMRA. Under that section, abundant precedent demonstrates that conditioning payment of contributions or benefits solely on the basis of union membership violates Section 8(a) of the LMRA. *See Dura Corp. v. NLRB*, 380 F.2d 970 (6th Cir. 1967); *Kroger Co. v. NLRB*, 401 F.2d 682 (6th Cir. 1968); *Mathew v. Burns*,

Inc., 205 Misc. 1006, 129 N.Y.S. 841 (1954); *Pennello v. Mine Workers*, 88 F. Supp. 935 (D.D.C. 1950); *Jandel Furs*, 100 N.L.R.B. 1390, 30 L.R.R.M. 1463 (NLRB 1952); *Trust Fund Services v. Glasscar, Inc.*, 19 Wash. App. 736, 98 L.R.R.M. 2656 (Wash. Ct. App. 1978). These fundamental principles of labor contract interpretation are so well established that this Court need not exercise its supervisory powers to pass upon basic principles not subject to challenge.

II. This Court Should Not Address the Estoppel Issue Where Petitioner Failed to Prove the Essential Element of Reasonable Reliance, Where Abundant Precedent Disfavors Use of Estoppel Principles Against the Trustees of Multiemployer Plans, and Where There Is No Conflict in the Circuits on the Use of Estoppel Principles on the Facts of This Case.

Petitioner further seeks to invoke the use of estoppel principles although the Court of Appeals correctly determined that petitioner had not reasonably relied upon the unauthorized statements of a union official as to coverage under the Central States Plan in the face of plan documents which explained that he had no authority to act on behalf of the Pension Fund. Furthermore, the official allegedly made his statements to employees of petitioner and not to petitioner itself. Petitioner then tried to use these statements to excuse contributions to the Pension Fund.

The Court of Appeals correctly determined that on those facts, it did not even have to reach the estoppel issue on the merits, as it had declined to rule on that issue previously in *Hodgins v. Central States Southeast and Southwest Areas Pension Fund*, 624 F.2d 760 (6th

Cir. 1980). Similarly, review by this Court of the estoppel issue is unwarranted in a factual context where petitioner failed to prove the necessary element of reasonable reliance.

Furthermore, the vast majority of courts have refused to bind such trustees to the statements of such officials. In another Central States case, *Reiherzer v. Shannon*, 581 F.2d at 1267 n.1, the Seventh Circuit Court of Appeals held:

> We have serious doubts, however, as to the advisability of employing estoppel principles in determining whether an individual will receive benefits from an employer-funded union pension plan. The vast majority of courts considering this issue have rejected the use of estoppel principles in cases of this sort. *Thurber v. Western Conference of Teamsters' Pension Plan*, 542 F.2d 1106, 1108-09 (9th Cir. 1976) (per curiam); *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (dictum); *Moglia v. Geoghegan*, 403 F.2d 110, 117-18 (2d Cir. 1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969); *Chamberlain v. Bakery Confectionary Union & Industry International Pension Fund*, No. C-76-784-CBR (N.D. Cal. October 3, 1977); *Hodgens v. Central States Southeast & Southwest Areas Pension Fund*, 94 L.R.R.M. 2507 (E.D. Mich. 1976); *Melang v. I.B.E.W. Pacific Coast Pension Fund*, 93 L.R.R.M. 2389 (W.D. Wash. 1976); *Dohrer v. Wakeman*, 14 Wash. App. 157, 539 P.2d 91 (1975). *But see Scheuer v. Central States Pension Fund*, 358 F. Supp. 1332 (E.D. Wis. 1973).

Scheuer, however, has been implicitly sapped of its authority by *Reiherzer*, a subsequent decision within the Seventh Circuit, which disavowed the *Scheuer* estoppel holding. *Reiherzer*, 581 F.2d at 1267 n.1. *Accord Galvez*

v. Local 804 Welfare Trust Fund, 543 F. Supp. 316 (E.D. N.Y. 1982). Furthermore, in *Scheuer*, in an unpublished opinion, the Seventh Circuit affirmed the district court's finding that the plaintiff was not an independent contractor. Because of the affirmance, the Seventh Circuit found it unnecessary to consider the district court's estoppel finding. Because the decision is unpublished, plaintiff cannot attach a copy of the opinion to his brief pursuant to Seventh Circuit Rule 35. A copy of the caption is attached to this brief as Appendix Exhibit "A." The Seventh Circuit has rejected *Scheuer* in *Reiherzer*, as has the Eighth Circuit in *Phillips v. Kennedy*.

In *Thurber*, the Ninth Circuit Court of Appeals held that misrepresentations of the Administrator of the Fund could not estop the plan trustees. There, plaintiff Thurber relied upon representations of an employee of the firm retained to administer the trust fund. The court, however, considered the rights of the other pensioners and held that the trust fund could not be so deflated by the statements of the administrator. *See also Aitken v. IP&GCU-Employer Retirement Fund*, 604 F.2d 1261 (9th Cir. 1979), where the Ninth Circuit Court of Appeals followed its decision in *Thurber* and again rejected estoppel arguments against fund trustees. *Aitken*, 604 F.2d at 1267. *See also Blinkhorn v. McCarthy*, 332 A.2d 43 (1974), finding estoppel not valid against plan trustees. If estoppel arguments cannot apply to an administrator employed by a fund, they certainly cannot apply to the actions of an independent union official over whom the fund has no control.

In *Phillips v. Kennedy*, the Eighth Circuit opined that "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons

not entitled to them under the express terms of the pension plan." 542 F.2d at 55 n.8.

In *Yglesias v. United Paperworkers Pension Fund*, 2 EBC 1851 (E.D. N.Y. 1981), the district court held that a retiree could not base his claim for increased pension benefits on a union president's misstatements since the pension fund was a separate entity from the union. The court held that pension fund trustees must discharge their duties in accordance with plan documents under ERISA Section 404(a)(1)(D). *See also Hiebel v. Pension Fund, Central States, Southeast and Southwest Areas*, 96 CCH Lab. Cas. ¶14,137 (W.D. Mich. 1982); *Dohrer v. Wakeman*, 14 Wash. App. 157, 539 P.2d 91 (1975); *Miracle v. U M W Welfare Fund*, 373 F. Supp. 603 (D.D.C. 1974); and *Shaw v. Northwest Truck Repair, Inc.*, 91 L.R.R.M. 2051 (Ore. Sup. Ct. 1975).

In *Hiebel*, the court concluded that the "local union is a separate entity and is quite distinct from the pension plan. The defendant pension plan should not be held responsible for the assurances of people over whom it has no control." 96 CCH Lab. Cas. at 23,917.

Finally, the petitioner has demonstrated no conflict in the circuit courts of appeal on the salient estoppel issues. Acknowledging that most courts refuse to apply estoppel principles against the trustees of multiemployer plans, the petitioner relies upon *Rosen* and *Scheuer* to suggest an alleged conflict. In fact, no such conflict exists regarding the pension fund. *Rosen* agreed with the basic principle disfavoring the use of estoppel principles against fund trustees absent "extraordinary circumstances." There the court found such an extraordinary circumstance where a fund trustee had misled a participant by direct statements to the participant. In contrast here, a union official over

whom the Pension Fund had no control made statements to employees of petitioner, which statements petitioner extracted second hand from the employees. No court of appeals decision binds pension fund trustees to the statements of third persons over whom they have no control. Furthermore, the *Scheuer* decision has been essentially invalidated by the subsequent decision in *Reiherzer*.

CONCLUSION

The Court of Appeals' determination is wholly consistent with well-established principles of interpretation of collective bargaining agreements. It is equally in accordance with the decisions of other appellate courts which find that estoppel principles should not be utilized against the trustees of multiemployer pension plans. Therefore, respondent Central States, Southeast and Southwest Areas Pension Fund respectfully submits that the Petition for a Writ of Certiorari should be denied or the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

BERNARD S. GOLDFARB
(*Counsel of Record*)
MARK V. WEBBER
GOLDFARB & REZNICK
Eighteen Hundred
55 Public Square
Cleveland, Ohio 44113
(216) 781-0383
Attorneys for Respondent Central States, Southeast and Southwest Areas Pension Fund

APPENDIX EXHIBIT "A"

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard October 27, 1977

December 9, 1977

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILSON COWEN, Senior Judge*

HOWARD N. SCHEUER, Plaintiff-Appellee, vs. CENTRAL STATES PENSION FUND, Defendant-Appellant.	)	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 69-C-636

No. 77-1051